

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNATHAN AARON BROWN,

Defendant-Appellant.

UNPUBLISHED

October 15, 2009

No. 285830

Wayne Circuit Court

LC No. 07-015417-FC

Before: K. F. Kelly, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (second offense), MCL 750.227b. The trial court sentenced defendant to prison terms of 9 to 20 years for second-degree murder, 1 to 5 years for felon in possession, and to a consecutive 5-year term for felony-firearm. Defendant appeals as of right. We affirm.

During an interview with police following his arrest, defendant wrote out a statement in which he acknowledged shooting at the victim but asserted that he acted in self-defense. Defendant's statement was admitted at trial without an objection. After filing a claim of appeal in this Court, defendant moved for a *Ginther*¹ hearing on the ground that defense counsel was ineffective by failing to move to suppress the statement that was obtained in violation of his constitutional rights. This Court granted defendant's motion and remanded the case to the trial court. Following a *Ginther* hearing, the trial court ruled that defendant's statement was voluntary, that he waived his right to counsel before making the statement, and that he was not denied the right to the effective assistance of counsel.

Whether defendant was denied his right to effective assistance of counsel generally presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error and issues of constitutional law are reviewed de novo by this Court. *Id.* Review of a trial court's decision whether a statement was voluntary requires this Court to conduct an independent

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

analysis of the record to determine whether the trial court's ruling was clearly erroneous. *People v Cipriano*, 431 Mich 315, 339; 429 NW2d 781 (1988). This Court gives "deference to the trial court's findings, especially where the demeanor of the witnesses is important, as where credibility is a major factor." *People v Williams*, 470 Mich 634, 642; 683 NW2d 597 (2004) (quotation omitted). This Court will reverse a trial court's finding on the voluntary nature of a defendant's statements only if it is left with a "definite and firm conviction that a mistake has been made." *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). A trial court's determination that a defendant effectively waived his Fifth Amendment and Sixth Amendment rights requires de novo review of the entire record, but a trial court's factual findings will not be disturbed absent clear error. *Williams, supra* at 640-641.

An involuntary statement made by a defendant introduced in a criminal trial for any purpose violates that defendant's due process rights. *Cipriano, supra*. The determination whether a statement was voluntary "should be whether, considering the totality of all the surrounding circumstances, the confession is 'the product of an essentially free and unconstrained choice by its maker' or whether the accused's 'will has been overborne and his capacity for self determination critically impaired.'" *Id.* at 333-334 (quotation omitted). In making this determination a trial court should consider factors including:

the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Cipriano, supra* at 334.]

The presence or absence of a single factor is not dispositive. *Id.* Instead, whether a statement is voluntary depends on the totality of the circumstances surrounding the statement. *Id.*

Applying the relevant factors in *Cipriano, supra*, and reviewing the totality of the circumstances in the instant case, we conclude that the trial court did not err in finding that defendant acted voluntarily in making his statement. At the time of the custodial interrogation, defendant was 29 years old with three years' of college education, and had had previous contacts with police. The interview lasted only approximately two hours, the interviewing officer reviewed defendant's constitutional rights with him, defendant read his rights aloud, indicated that he understood his rights, and initialed next to each one. Defendant was not under the influence of any intoxicants or drugs, did not appear tired, did not ask for food or drink, or to use a restroom, and did not have any medical conditions. Furthermore, the officer did not threaten defendant or promise him anything; defendant agreed the officer was polite, and defendant also acknowledged that his statement was voluntary, that his statement was truthful, and that he wanted to inform police he acted in self-defense. Viewing the totality of these circumstances, we are not left with a "definite and firm conviction" that the trial court erred in finding defendant's statements were voluntarily made. *Sexton (After Remand), supra*.

With respect to defendant's argument that his Sixth Amendment right to counsel was violated during the police interview, a criminal defendant's Sixth Amendment right only attaches once "adversarial legal proceedings have been initiated against a defendant by way of indictment, information, formal charge, preliminary hearing, or arraignment." *People v Marsack*, 231 Mich App 364, 376-377; 586 NW2d 234 (1998). In this case, defendant made his statement to police before any formal charges were brought against him and before he was brought before a court; defendant's Sixth Amendment right to counsel had not yet attached.

Defendant also contends that his statement was obtained in violation of his Fifth Amendment right to counsel. The Fifth Amendment requires that "custodial interrogation be preceded by advice to the [] [defendant] that he has the right to remain silent and also the right to the presence of an attorney." *Edwards v Arizona*, 451 US 477, 481-482; 101 S Ct 1880; 68 L Ed 2d 378 (1981), citing *Miranda v Arizona*, 384 US 436, 479; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Once a defendant invokes his Fifth Amendment right to counsel, all questioning must cease absent an attorney. *Davis v United States*, 512 US 452, 458; 114 S Ct 2350; 129 L Ed 2d 362 (1994). However, law enforcement may question a defendant who waives his right to counsel after being informed of his *Miranda* rights. *Davis, supra* at 548. A waiver of a defendant's Fifth Amendment right to counsel is effective if it is made voluntarily, knowingly, and intelligently. *Williams, supra* at 640. In making this determination, "[c]redibility is crucial in determining a defendant's level of comprehension, and the trial judge is in the best position to make this assessment." *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996).

Defendant testified at both trial and at the *Ginther* hearing that he asked for an attorney several times and that the interviewing officer refused to comply with his request. Whether defendant invoked his Fifth Amendment right to counsel involves a credibility contest, and the trial court was in the best position to judge credibility of witnesses. *Cheatham, supra*. In addition to the interviewing officer's trial testimony, defendant signed a form indicating that he was aware he had the right to a lawyer, that he did not have to talk, and that he desired to answer questions. Defendant agreed that he understood his rights and was not coerced in any way. Furthermore, defendant stated at the *Ginther* hearing that he wanted to inform police he was acting in self-defense on the night of the incident. On this record, the trial court's factual finding that defendant knowingly, intelligently, and voluntarily waived his constitutional right to counsel was not clearly erroneous. *Id.*

In light of our conclusion that defendant's statement was not obtained in violation of his constitutional rights, we also conclude that defendant was not denied the effective assistance of counsel when trial counsel declined to move to suppress the statement. See *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003) ("Defense counsel is not required to make a meritless motion or a futile objection"). Further, defense counsel used the statement as part of the trial strategy to show that defendant was always consistent about the shooting and claimed self-defense from the first time he spoke with police through the time of trial. We "will not second-guess counsel on matters of trial strategy" or "assess counsel's competence with the benefit of hindsight." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

Finally, in his Standard 4 brief on appeal, defendant contends that he was denied the effective assistance of counsel when his counsel failed to investigate a security camera that he claims was in place at the location where the victim was discovered dead inside his vehicle. Defendant has not established the factual predicate for his claim of ineffective assistance of

counsel, and thus, he cannot prevail. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Specifically, defendant failed to cite any evidence in the record to support the existence of a surveillance camera at the location where the victim was discovered. Moreover, the mere assertion that there may be useful evidence out there, somewhere, does not adequately substantiate that defense counsel was ineffective for failing to adequately investigate. See *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald